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MICHAEL RODAK, JR., CL

In The

Supreme Court of the United States

No. 71-1523

RICHARD W. HUNT,

Appellant,

vs.

ROBERT E. McNAIR, Governor of the State of South Carolina, et al.,

Appellees.

On Appeal from Supreme Court of South Carolina

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OUT OF TIME AND BRIEF AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OUT OF TIME

The Attorney General of the State of New Jersey hereby moves for leave to file out of time the attached brief amicus curiae on the grounds that although he attempted to ascertain the briefing schedule in order that New Jersey could participate in this matter in a timely fashion, he was unable to do so and thereby inadvertently allowed the time for filing to elapse. The attorneys for the appellant and appellees have consented to the filing of this brief.

On July 14, 1972, the Attorney General of New Jersey wrote to the Attorney General of South Carolina indicating that New Jersey might be interested in participating as amicus curiae if an appeal was taken to the Supreme Court of the United States in this case and asked that he be advised if and when a petition for a Writ of Certiorari or a Notice of Appeal were filed. The Attorney General of South Carolina responded through the attorney for the appellant that a Jurisdictional Statement had been filed but no action taken by this Court. After this Court noted probable jurisdiction on October 16, 1972, the Attorney General of New Jersey contacted the office of the Clerk of the Supreme Court of the United States and was informed that, as of that date, no briefs had been filed. On December 15, 1972, the Attorney General of New Jersey again wrote to the Attorney General of South Carolina and asked for the briefing schedule in order to participate in this matter in a timely fashion. (Since New Jersey supports the position of South Carolina its brief should be filed at the same time as that of South Carolina.) Although the Attorney General of New Jersey received a response from South Carolina on or about January 2, 1973, such response did not include the requested briefing schedule or any indication whether South Carolina's brief had, in fact, been filed. On January 25, 1973, the Attorney General of New Jersey telephoned the office of the Clerk of the Supreme Court of the United States and was advised that the appellant's brief had been filed on November 25, 1972 and that the brief on behalf of South Carolina had been filed on December 27, 1972. Immediately, the within brief was prepared.

In view of the extent of New Jersey's interest in the adjudication of this issue, and of the fact that the Attorney General of New Jersey made every attempt to ascertain the proper briefing schedule, it is respectfully submitted that this Court should grant the requested leave to file the attached brief amicus curiae out of time.

Respectfully submitted,

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Of Counsel

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BRIEF OF AMICUS CURIAE THE ATTORNEY GENERAL OF NEW JERSEY

Interest of Amicus Curiae

In 1966 the New Jersey Legislature adopted the New Jersey Educational Facilities Authority Law (hereinafter "Law") which established the New Jersey Educational Facilities Authority (hereinafter "Authority") within the State Department of Higher Education. L. 1966, c. 106, 107, 108, 109 and 110 (N.J.S.A. 18A:72A-1 through 39). This Law is similar to the South Carolina Educational Facilities Authority Act which is the subject of this appeal.

Both statutes establish an educational facilities authority to assist private institutions for higher education to build necessary educational facilities, e.g., dormitories, dining halls, student unions, administration buildings, academic buildings, libraries, laboratories, research facilities, classrooms, athletic facilities, storage facilities and other facilities required for the instruction of students or research. N.J.S.A. 18A:72A-3; S.C. Code Ann. §22-41.2 (1962). Whereas the New Jersey Authority can assist both public and private institutions, the South Carolina Authority's aid is limited to private institutions. Each statute specifically excludes assistance for "any facility used or to be used for sectarian instruction or as a place for religious worship." N.J.S.A. 18A:72A-3; S.C. Code Ann. §22-41.2 (1962).

The aforementioned educational facilities or projects are financed by borrowing money at the low interest rates afforded by the tax exempt status of the authorities' bonds. These bonds are the sole responsibilities of the authorities and are not debts or liabilities of the states. N.J.S.A. 18A:72A-8, 10, 18, 37; S.C. Code Ann. §22-41.8, 10, 14 (1962). The authorities are self-sustaining in that the principal and interest payments on the bonds and the expenses of maintaining the facilities are paid out of the revenues derived from the use of the facilities. N.J.S.A. 18A:72A-11, 30, 31; S.C. Code Ann. §22-41.5, 8 (1962).

The New Jersey Authority can finance a facility at a private institution by the same lease-back

method described in the appellees' brief at page 5. N.J.S.A. 18A:72A-30. However, as a matter of practice, the New Jersey Authority has financed projects at private institutions primarily by means of a loan agreement secured by a mortgage of the land, buildings and contents, by a pledge of the general resources of the institution, and by a special fee or tuition imposed and collected by the institution. N.J.S.A. 18A:72A-30, 31, 32. As in South Carolina, the New Jersey Authority appoints a trust company or bank as trustee for each bond issue. N.J.S.A. 18A:72A-9; S.C. Code Ann. §22-41.9 (1962). The trustee receives the fees collected by the institution and collects the mortgage payments or rents charged to the institution, pays the principal and interest to the bondholders and assumes general fiscal supervision in connection with the bonds issued.

The constitutionality of the New Jersey Law was challenged on State constitutional and First Amendment grounds and has been the subject of three opinions by the Supreme Court of New Jersey. Clayton v. Kervick, 52 N.J. 138, 244 A.2d 281 (1968); 56 N.J. 523, 267 A.2d 503 (1970); vacated and remanded for reconsideration in light of Lemon v. Kurtzman; Earley v. DiCenso; Robinson v. DiCenso and Tilton v. Richardson, 403 U.S. 945 (1971); 59 N.J. 583, 285 A.2d 11 (1971).

In the first Clayton v. Kervick case, the Supreme Court of New Jersey held that the Law does not violate either the debt limitation clause or the loan of credit clause of the New Jersey Constitution. In the second Clayton v. Kervick

case, the Court held that the financing of projects at sectarian institutions of higher learning does not violate the Establishment Clause of the First Amendment. It said that the Authority is engaged in what is essentially a banking operation which the State cannot deny to sectarian institutions for higher education any more than a municipality can deny sectarian institutions water, electricity or police and fire protection. The Court emphasized that the First Amendment is basically neutral in that government can neither aid nor inhibit religion and to deny such services would at least invite the claim that religion is thereby inhibited.

The Supreme Court of the United States remanded this decision with the following instructions:

> "Judgment vacated and cases remanded for reconsideration in light of this Court's decisions in Lemon v. Kurtzman, Earley v. Di Censo, and Robinson v. Di Censo, ante, p. 602; and Tilton v. Richardson, ante, p. 672." 403 U.S. 945.

This remand was on the same day and presumably for similar reasons as the remand of the instant appeal to the Supreme Court of South Carolina. Hunt v. McNair, 403 U.S. 945 (1971).

On remand, the supreme courts of both states held that the respective laws did not violate the First Amendment. Clayton v. Kervick, 59 N.J. at 583, 285 A.2d at 11; Hunt v. McNair, 187 S.E.2d 645 (1972). The Supreme Court of New Jersey held that the New Jersey Law is valid,

that a facility may never "be used for sectarian instruction or as a place for religious worship," and that no college may participate if it restricts entry on racial or religious grounds or requires all students to receive instruction in the tenets of a particular faith.[1] The Court added that it could not say whether other religious precepts or practices, unrelated to the immediate use of the facility, will disqualify a college but regardless of the disqualification of particular colleges the Law is still valid.

1. This Court in its plurality opinion in Tilton v. Richardson, supra, hinted, without reaching the question, that certain institutions of higher education might, if challenged, be found constitutionally ineligible for government construction assistance if they impose religious restrictions on admissions, require attendance at religious activities, compel obedience to church doctrine, require instruction in theology, and otherwise act to propagate a particular religion. 403 U.S. at 682. Justice White in a "postscript" to his opinion concurring in the Tilton decision states with more certainty that he would find unconstitutional any governmental assistance to a school which "restricted entry on racial or religious grounds or required all students gaining admission to receive instruction in the tenets of a particular faith." 403 U.S. at 671, n. 2. As Justice White's vote was required for the result obtained in Tilton, it could be inferred that any governmental assistance to higher education which was in contravention of the two strictures set forth in his opinion would have been struck down by the Court. The Supreme Court of New Jersey attributed just such a significance to Justice White's postscript, and, as a consequence, read Justice White's two strictures into the New Jersey Educational Facilities Authority Law. Clayton v. Kervick, 59 N.J. at 600, 285 A.2d at 20-21. The New Jersey Court held explicitly that no college may participate in the program if it restricts entry on racial or religious grounds or requires all students to receive instruction in the tenets of a particular faith; the Court noted further that it was unable to say on the basis of existing constitutional law whether other religious precepts or practices, unrelated to the immediate use of a facility, would also disqualify a college. 59 N.J. at 601, 285 A.2d at 21.

Although the Authority has not promulgated any rules or regulations setting forth how a sectarian institution will qualify for its assistance, it considers each application on a case by case basis to determine whether the financing of a particular project will cause excessive entanglement between the State of New Jersey and religion. In making this determination, the Authority uses the tests set forth in the plurality opinion in Tilton v. Richardson, supra at 685. These tests are whether the institution forms an integral part of the religious mission of a sectarian group, whether the facilities to be financed are inherently neutral as to religion and the degree of contact required between the State and the sectarian institution. In addition, the Authority imposes the prohibitions set forth by the Supreme Court of New Jersey in the third Clayton v. Kervick opinion: no college may participate if it restricts entry on racial or religious grounds or requires all students to receive instruction in the tenets of a particular faith. Clayton v. Kervick, 59 N.J. at 601, 285 A.2d at 21.

In view of the similarities between the South Carolina and the New Jersey laws and the parallel treatment of these laws by the Court in Hunt v. McNair and Clayton v. Kervick, 403 U.S. at 945, the State of New Jersey has a clear interest in the instant appeal as amicus curiae.

Argument

THE ESTABLISHMENT CLAUSE PERMITS STATES TO PROVIDE FINANCING SERVICES FOR THE CONSTRUCTION OF FACILITIES AT RELIGIOUSLY AFFILIATED INSTITUTIONS OF HIGHER EDUCATION.

Initially, this appeal requires the Court to determine whether the restrictions imposed by the First Amendment on financial assistance to religiously affiliated educational institutions apply at all to loans by an independent state authority which operates on a self-sustaining basis by the issuance of revenue bonds. Compare Lemon v. Kurtzman, 403 U.S. 602 (1971) and Tilton v. Richardson, 403 U.S. 672 (1971) with Walz v. Tax Com'n, 397 U.S. 664 (1970).

The educational facilities authority acts of South Carolina and New Jersey may be likened to many other acts providing governmental services of benefit to certain "consumers." It has never been suggested that a state is required or even allowed to withhold from religious groups such general services as police or fire protection. Walz v. Tax Com'n, supra at 671. Surely a government which sells water or electricity to the secular consumer may do business with a religiously affiliated consumer upon the same basis. Id. Nor must employees of religiously affiliated institutions be excluded from social security or a workmen's compensation program. This is true even though the government may confer a benefit under the programs which a

private entrepreneur offering the same programs would not or could not provide. These same principles dictate that a state program to finance higher education facilities may be made available to all "consumers," secular or sectarian.

As the Supreme Court of New Jersey wrote in the second of its three decisions concerning the New Jersey Educational Facilities Law:

> "Here we are dealing essentially with a banking operation conducted by an agency of the State. If the operation were as extensive as a general banking business, it could hardly be urged the establishment clause would bar every sectarian borrower. We see no difference in principle because the State has embarked upon a banking venture in a limited area in which, in words of section 1, 'financial resources are lacking' for the construction of 'required dormitory and other educational facilities at public and private institutions of higher education.' Again, this is not to deny that the sectarian institution will derive a 'benefit' from the governmental service. Obviously there is a benefit in obtaining something not provided by regular commercial sources, or in obtaining it at a lower rate of interest. Here, as in other areas of commercial activity a State may enter, the State has credit and tax advantages which reduce the cost of money to it, and, further, since the State has no stockholders, it may offer its service without a profit. The consumer

thereby may enjoy a dollar benefit. But, the fact remains that the State furthers a public purpose and the benefit to sectarian interests is as incidental as in the sale of municipally supplied water or electricity." Clayton v. Kervick, 56 N.J. 523, 530-31, 267 A.2d 503, 506-07 (1970).

The Supreme Court of New Jersey noted further that to deny to a sectarian institution a financing service it offers to otherwise similarly situated institutions would at least invite the claim that religion is thereby inhibited. 56 N.J. at 530, 267 A.2d at 506. It is respectfully submitted, in accordance with this rationale, that the Establishment Clause permits the program under consideration just as it permits the government provision of any other service on a self-sustaining basis to all consumers.

Assuming arguendo, however, that the same general principles which govern the conformity with the First Amendment of direct financial assistance to educational institutions also apply to such a financing service, there still can be no doubt as to its validity. The critical test with respect to direct financial assistance, as explained in Lemon v. Kurtzman, supra at 613, is whether it "fosters an excessive government entanglement with religion." An initial premise must be that some contact between church and state is not only permissible, but necessary. Lemon v. Kurtzman, supra at 614. The question is how much. Certainly the very act of deciding

whether a particular use of a facility is sectarian is not excessively entangling. To hold otherwise would be to prohibit all enforcement of the church-state provision, including that contemplated in Tilton v. Richardson, supra. It may be noted too that this Court's decision in Walz v. Tax Comm'n, supra, contemplated that the government may determine whether church-owned property is used for church purposes within the meaning of a property tax exemption statute which is equally entangling. Nor would litigation to enforce the terms of a mortgage or a lease be excessively entangling. If it were, the Establishment Clause would require rather than simply permit tax exemptions for church-owned property, as the imposition of a tax might result in a tax lien and ensuing litigation. Further, as observed by the appellees in the instant case, even a foreclosure action by the state against a church affiliated institution would simply be a creditor's action to enforce financial obligations, involving no religious entanglement. If the law were otherwise, the government would be barred from numerous kinds of financial assistance to religiously affiliated organizations, for example, for housing and hospital programs. See, e.g., The Housing and Urban Development Act of 1968, Pub. L. 90-448 (for example, at 12 U.S.C.A. §1701x). It would indeed bar the enforcement of any laws, from building codes to incorporation requirements, regarding such organizations.

The New Jersey and South Carolina educational facilities acts may, under certain circumstances,

require contacts between the government and religiously affiliated organizations with respect to charges and fees for the facilities, or other ongoing financial matters concerning the operation of the facilities, but these contacts will be minimal. As in the program approved in Tilton v. Richardson, supra, the contact will consist primarily of a one-shot financial transaction followed by inspections to insure no religious use of facilities. In the present case, there will as well be continuing contacts concerning certain limited financial arrangements. This Court has struck down programs of assistance to church related schools where the programs required entanglement in the form of "comprehensive, discriminating, and continuing state surveillance," Lemon v. Kurtzman, supra, 403 U.S. at 619, but where less church-state contact was required, as for example regarding the loan of textbooks to religiously affiliated schools, Bd. of Ed. v. Allen, 392 U.S. 236 (1968), or transportation to such schools, Everson v. Bd. of Ed., 330 U.S. 1 (1947), this Court has upheld the programs. The programs considered in Allen and Everson clearly involved extensive administrative cooperation between government and schools, yet such cooperation concerned only matters of management not directly affecting basic educational policy. It was thus permitted. Similarly, the administrative cooperation between college and state which might be required by the New Jersey or South Carolina acts, fosters no excessive entanglement.

There are a number of other considerations mentioned in Tilton which show that the validity of the Educational Facilities Authority Law rests on even firmer grounds than the direct grant provisions upheld in that case.[2] The plurality opinion of the Court noted the significant differences between the religious aspects of church related institutions of higher learning and parochial elementary and secondary schools: (a) college students are less impressionable and less susceptible to religious indoctrination, (b) college and post-graduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines, and (c) many church related colleges and universities are characterized by a high degree of academic freedom. 403 U.S. at 686. New Jersey's statute is similarly limited to institutions of higher learning, N.J.S.A. 18A: 72A-26, 30, 31, so these considerations are equally applicable here. The plurality opinion in Tilton also relied upon the nonideological character of the aid which the federal statute provides, thus distinguishing it from the salary subsidy programs invalidated in Lemon v. Kurtzman. New Jersey's statute also limits its loans to the financing of facilities that are religiously neutral. Finally, the Court in Tilton and Lemon pointed to "divisive political potential" as another relevant

2. It is noteworthy that the Higher Education Facilities Act not only authorizes federal grants to institutions of higher education for the construction of academic facilities, 20 U.S.C.A. §711, but also authorizes the Commissioner of Education to make loans to such institutions. 20 U.S.C.A. §741. Yet the plaintiffs in Tilton did not even attempt to attack the loan provisions of the Act but confined their arguments to the invalidity of the grant provisions.

factor. In this case no expenditures of taxpayers' money are involved in affording religiously affiliated colleges access to the same financing services provided public and other private institutions of higher learning. Nor is it very likely that the mechanics of such arcane financing procedures will be the subject of political controversy. See Walz v. Tax Comm'n, supra at 674-76. Finally, as in Tilton, it is pertinent that "(t)he potential for divisiveness inherent in the essentially local problems of primary and secondary schools is significantly less with respect to a college or university whose student constituency is not local but diverse and widely dispersed." 403 U.S. at 689.

In short, there is no danger of "excessive entanglement" under the New Jersey program. If the State lends money to a private college for the construction of an educational facility pursuant to N.J.S.A. 18A:72A-31, no entangling relationship between the State and private college will ensue. There is no governmental analysis of the school's curriculum, nor is there any obligation on the part of the government to monitor classes held in facilities constructed with State loans. Unlike the Rhode Island and Pennsylvania programs invalidated in Lemon v. Kurtzman, New Jersey's program does not involve an annual appropriation by the Legislature. The Authority operates on a self-sustaining basis by selling its bonds to private sources and paying the principal and interest out of revenues gained by the use of the moneys so obtained. N.J.S.A. 18A:72A-11, 30, 31. The New Jersey program is a one-time,

single purpose construction loan within the purview of the Tilton rationale; and this is true even though the statute provides that each loan "shall be premised upon an agreement between the authority and the private college as to payment, security, maturity, redemption, interest and other appropriate matters." N.J.S.A. 18A:72A-31(a). Such agreements are self-executing once made, and do not involve the day-to-day minute inspection and supervision, entangling the State in the internal affairs of the institutions, which the Court found objectionable in Lemon.

Conclusion

It is respectfully submitted for the reasons set forth in the brief for the State of South Carolina and in this brief that the decision of the Supreme Court of South Carolina should be affirmed.

Respectfully submitted,

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